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UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum AT 01772

TO W. Bruce Gillis, Jr., Regional Director
Region 27

DATE JUL 30 1986

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SUBJECT Mile-Hi Metal Systems, Inc.,
Case 27-CA-9241, 9418, 9472

These cases against an employer in Chapter 11 reorganization were submitted for advice as to (1) whether the Employer violated Section 8(a)(5) by implementing changes in contractually established working conditions without further bargaining with the Union after the bankruptcy court authorized rejection of the collective bargaining agreement; (2) whether the Employer's polling of employees regarding their union sympathies was violative of Section 8(a)(1) because it was conducted at a time when the Employer did not have objective considerations to support a good faith doubt that the Union had lost majority support; (3) whether the Employer violated Section 8(a)(5) by withdrawing recognition based on the results of that poll; and (4) whether the Employer's obligations under an informal settlement agreement settling a Section 8(d) complaint regarding failure to make benefit contributions include the obligation to pay attorney fees incurred in collecting those contributions.

FACTS

Mile Hi Metal Systems, Inc. (the "Employer") has had a collective bargaining relationship with Sheetmetal Workers International Association, Local 9 (the "Union") for many years; the parties' most recent collective bargaining agreement was effective from July 1, 1983 until July 1, 1986. In January 1985, the bargaining unit consisted of thirty two employees.

In April 1985, the Employer stopped making employee benefit fund contributions required under the contract. On April 12, twenty seven of the thirty two unit employees struck the Employer in protest of the Employer's failure to make these payments. On the same day, the Employer filed for reorganization under Chapter 11 of the Bankruptcy Code. The employees returned to work on April 13 but struck again on April 16 over the same issue. On May 10, the Union filed the charge in Case 27-CA-9241, alleging, in pertinent part, that the Employer violated Section 8(a)(5) by failing to pay the contributions.

On May 29, the bankruptcy court granted the Employer's motion for interim relief from its collective bargaining agreement. On the same day the Employer submitted to the Union proposals for permanently modifying the agreement. These proposals included: (1) a 30% reduction in wages and benefits for

all unit employees except those in the "pre-apprentice" classification (pre apprentices' wages and benefits were to remain unchanged); (2) a reduction in subsistence expenses paid to employees who had to travel to jobs; (3) a new requirement that employees supply certain tools; (4) modification of the prohibition on employees' transporting tools and material in their own vehicles; (5) modification of the union security agreement to permit the Employer to hire strike replacements without requiring them to become Union members; and (6) modification of the provision for appointing Union stewards to require that a steward be appointed only if there were three or more Union members on a job. On June 7, accountants for the Employer and the Union met to review company financial records. On June 10, the Employer petitioned the bankruptcy court for authorization to reject the collective bargaining agreement.

The parties held one bargaining session on June 19 regarding the Employer's proposal but were unable to reach agreement. On June 21, at a hearing on the Employer's motion to reject the contract, the bankruptcy judge ordered the parties to negotiate further.

Accordingly, the parties met on June 26. The Union told the Employer that its proposals regarding modification of the union security and union stewards proposals (numbers 5 and 6 above) were illegal. In addition, the Union rejected the Employer's economic proposals. The parties met again on June 27. The Employer modified its wage/benefit proposal to a 25% reduction but did not change proposals 5 and 6. The Union rejected this offer as well.

In an Order dated June 28, the bankruptcy judge granted the Employer's petition to reject the contract. Specifically, the court found that in offering its proposal the Employer met all the requirements of Section 1113(b)(1); it further found as required by Section 1113(c)(2) and (3), respectively, that the Union had rejected the proposal without good cause and that the balance of equities favored rejection of the contract. With respect to the Union's argument that it could not accept the Employer's proposal because it contained illegal provisions, the court found that it had no jurisdiction to determine the legality of the proposals and, even if the proposals were illegal, the Union was not justified in rejecting the entire proposal. Rather, the court reasoned, the Union should have accepted the other provisions and thus allowed a determination of whether the specific proposals were "acceptable." No appeal was taken from this decision.

After June 28, without any further bargaining with the Union, the Employer implemented a new wage structure based on, what it termed, a "variety of factors," including prior

experience, the number of applicants available, and need for particular skills. As a result, no two employees were paid the same rate. In general, all unit employees except pre-apprentices received wage cuts of approximately 40%. The Region has concluded that the wage rates imposed by the Employer were not encompassed by the proposals the Employer presented to the Union in May and June.

On June 29, the Union asked the Employer to resume bargaining for a new contract.

On July 8, the Union made an unconditional offer to return to work. By that time the Employer had hired replacements for all the strikers and did not respond to the Union's offer. The Region issued complaint on August 15, alleging that the failure to make benefit contributions was an unfair labor practice. Although the Region was aware that the unfair labor practice alleged was the reason for the strike, the complaint did not allege that the strike was an unfair labor practice strike. To date, the Union has not filed a charge alleging that the Employer violated the Act by failing to accord the strikers reinstatement rights of unfair labor practice strikers.

On July 18, the Employer replied to the Union's June 29 request for bargaining by suggesting that the parties meet on August 8. The Union replied that it preferred to set aside several days in a row to meet, but it nevertheless agreed to meet on August 8.

The only subject discussed at the August 8 meeting was a proposed Memorandum of Understanding presented by the Employer concerning detailed ground rules for negotiations. The Union rejected this proposal in a letter dated August 13 and requested future dates for negotiations. The Union repeated the request in a letter dated September 3.

In a letter dated September 16, the Union asked the Employer to confirm whether it had made any changes in terms or conditions of employment since the bankruptcy court authorized rejection of the contract on June 28.

On September 17, the Regional Director approved an informal settlement in Case 27-CA-9241. In addition to agreeing to make the contractually required benefit payments and to refrain from unilaterally discontinuing such payments in the future, the Employer agreed that it would "upon request bargain in good faith with [the Union] over the terms of a new collective bargaining agreement. . . ."

In a letter dated September 27, the Union again repeated its request for bargaining with the Employer and

specifically asked the Employer to meet on October 16. The Employer did not respond to the request for negotiations, but, on October 15, the Employer notified the Union that it intended to conduct a poll of its employees the following afternoon to determine whether a majority of employees still desired to be represented by the Union. At that time there were 22 unit employees working for the Employer. Of these, five had been employed prior to the strike and had not joined the strike; 17 were strike replacements. On the same date the Employer distributed to all employees an announcement that an employee meeting would be held at 1:00 p.m. on October 16 "to discuss the company's future relationship with the [Union]." The notice concluded with the statement that payroll checks would be distributed and employees would be free for the day at the end of the meeting.

The Union responded immediately with a telegram contending that a poll would be illegal. The Employer nevertheless went ahead with its plans. At the employee meeting on the 16th, Kim Hanson, the Employer president, made a speech in which he explained that he had called the meeting to determine whether the employees wished to continue to be represented by the Union. Hanson went on to say that the Employer recognized the Union only because "up to now the law has required us to." He stated that the Employer did not want the Union and thought it would be in the employees' interest to have no Union. Hanson also stated, however, that employees had a right to vote for the Union and if the Union received a majority of votes cast, "the company must, by law, continue to recognize [the Union] as your bargaining agent." Hanson then explained he would turn the meeting over to a neutral party who would conduct a secret ballot election.

The results of the election were as follows: 22 employees voted; of these, 17 cast ballots for no union; 2 cast ballots for the Union and 3 ballots were not counted. The striking employees were not invited to vote. Employees were allowed to go home when they had finished voting. All employees had left by about 1:45; the workday normally ended at 3:30. The Employer then attended the meeting arranged by the Union for October 16, and handed Union representatives a letter which stated that, in view of the results of this election, the Employer was withdrawing recognition from the Union.

The Union filed the charge in Case 27-CA-9418 on October 16 and amended it on October 22, alleging that the Employer violated Section 8(a)(5) by unilaterally changing the wage structure and wages of employees, and by withdrawing recognition from the Union; the Union further alleged that the Employer violated Section 8(a)(1) by conducting the poll on

October 15 and by allowing employees time off with pay after they had finished voting.

The Union filed the charge in Case 27-CA-9472 on December 5, alleging that the Employer had refused to provide names and addresses of unit members on various dates since June 5. The Region issued complaint on January 16, 1986 alleging that the Employer violated Section 8(a)(5) by failing to provide the requested information between June 5 and June 29, 1985.

In subsequent discussions with the Region regarding the back pay due under the settlement in Case 27-CA-9241, the Union asserted that the Employer was liable not only for the benefit fund contributions it had failed to make but also for attorney fees the Union incurred in collection efforts. In support of this claim the Union relied on a provision in the fund agreement that requires an employer which is delinquent in its contributions to pay the attorney fees incurred by the Union in collecting the payments.

ACTION

We concluded that if a bankruptcy court approves an employer's application to reject a contract pursuant to Section 1113 of the Bankruptcy Code, the employer has no further obligation to bargain under Section 8(a)(5) before it may implement the proposal it presented to the Union in connection with its Section 1113 application. With respect to working conditions not encompassed in the Section 1113 proposal, however, an employer must satisfy all Section 8(a)(5) bargaining obligations before making unilateral changes. Accordingly, complaint should issue absent settlement, alleging that the Employer violated Section 8(a)(5) by changing the wage structure and wages in a manner not encompassed by its Section 1113 proposal.

We further concluded that neither the poll conducted on October 16 nor any other indicia relied on by the Employer can form the basis for a reasonable doubt that the Union has lost majority support because when the striking employees are counted as part of the unit, as they must be, the unit consists of 49 employees. The Employer's reliance on disaffection from, at most, 17 employees does not demonstrate loss of majority support. Accordingly, the complaint should allege that the Employer independently violated Section 8(a)(1) by conducting the poll and that it violated Section 8(a)(5) by withdrawing recognition based on the results of the poll.

Based on these conclusions, we further concluded that the Region should amend the complaint in Case 27-CA-9472, to allege additionally that the Union still retains its status as

collective bargaining representative in the unit and that the Employer violated Section 8(a)(5) to the extent it failed to provide relevant information requested by the Union after June 29 and to the extent such allegations are not barred by Section 10(b).

Finally, in view of the Employer's withdrawal of recognition less than three weeks after it entered into a settlement agreement in which it agreed to recognize and bargain with the Union, the Region should set aside the settlement agreement and litigate the underlying unfair labor practice complaint in Case 27-CA-9241. Moreover, that complaint should be amended to allege that the employees' strike on April 16 was caused by that unfair labor practice and that the employees are entitled to reinstatement upon an unconditional offer to return to work.

A. The obligation to bargain after rejection

1. Bargaining over changes encompassed by the Section 1113 proposal.

Generally, an employer subject to the NLRA is not free to make unilateral changes in terms and conditions of employment upon expiration of a collective bargaining agreement. Although the employer is no longer contractually obligated to continue the terms and conditions contained in the contract, these terms have become established terms of employment and before the employer may unilaterally change them, it must give the Union notice of the proposed changes and upon request bargain to impasse. NLRB v. Katz, 369 U.S. 736, 745-746 (1962) (employer in negotiations for initial contract violated Section 8(a)(5) by unilaterally instituting changes not previously discussed or not discussed to impasse); NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217, 225 (1949) (post-expiration unilateral change was found violative); Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721, 729 (9th Cir. 1980), enf'g 238 NLRB 69 (1978) (same).

In the instant case the question is whether and to what extent this rule (referred to herein as the Katz rule) applies to an employer in Chapter 11 whose labor contract "expires" by virtue of court-authorized rejection. In NLRB v. Bildisco & Bildisco, 465 U.S. 513, 546-547, n. 14 (1984), the Court held that the Katz rule did not preclude an employer from making unilateral changes before rejection. 1/ But that case did not raise the issue of the legality of post-rejection unilateral changes. Moreover, Congress overruled Bildisco in certain respects by enacting Section 1113 of the Bankruptcy Code.

1/ See also Maislin Transport of Delaware, Inc., 274 NLRB No. 74, sl. op. at 4 (1985)

Although Section 1113 does not explicitly deal with an employer's rights or duties after rejection, we believe its provisions provide guidance on the appropriate scope of the Section 8(a)(5) bargaining obligation to be imposed on Chapter 11 employers after rejection.

Accordingly, we begin with a brief summary of Section 1113. That section provides that before an employer may apply to the bankruptcy court for authorization to reject its labor contract, it must present a proposal to the Union which "provides for those necessary modifications in the employees' benefits and protections that are necessary to permit the reorganization of the debtor. . . ." 2/ The proposal must be based on the most complete and reliable information available at the time and must assure that the debtor, all creditors and all affected parties are treated fairly and equitably. 3/ In addition, the employer must provide the union with the relevant information necessary to evaluate the proposal. 4/

Having presented the proposal and information to the union, the employer may then apply for authority to reject. Ordinarily the court will schedule the matter for hearing within 14 days of the date of the application. 5/ Between the presentation of the proposal to the union and the hearing on the application to reject, the employer must "meet at reasonable times, with the [union] to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement." 6/

The court will approve rejection only if it finds that: (1) the employer made a proposal and provided information as required under Section 1113(b)(1)(A) and (B); (2) the union has rejected the proposal without good cause and (3) the balance of the equities clearly favor rejection. 7/

The court must rule on the application for rejection within 30 days after the commencement of the hearing or within such extensions as the trustee and union agree to. Prior to the expiration of such period, the employer may not alter or

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2/ Section 1113(b)(1)(A)

3/ Id.

4/ Section 1113(b)(1)(B)

5/ Section 1113(d)1)

6/ Section 1113(b)2)

7/ Section 1113(c)

terminate the contract unless it obtains separate court authority for interim relief pursuant to Section 1113(e). 8/

We concluded that a Chapter 11 employer's obligation under Section 8(a)(5) does not require it to bargain after rejection before it may implement the proposed terms and conditions of employment which are contained in its Section 1113 proposal.

First, inasmuch as authorization to reject the contract necessarily includes a finding that the changes are necessary to permit reorganization, we concluded that an NLRA rule precluding an employer from implementing these changes would impermissibly conflict with the fundamental purposes of Chapter 11. 9/ As noted above, one of the standards for rejection is that the employer's proposal met the requirements of Section 1113(b)(1). And, Section 1113(b)(1) requires, inter alia, that the proposal consist of "necessary modifications. . . necessary to permit reorganization of the debtor." Although this language is intended to limit the scope of a proposal to the minimum changes necessary, 10/ once the court has concluded that an employer's proposal meets this strict standard, a rule postponing the implementation of changes "necessary to permit reorganization" would undercut the rehabilitative function of Chapter 11.

Second, allowing a union to insist on a second round of bargaining after rejection would be a disincentive to serious bargaining during the pre-rejection bargaining, a result directly contrary to the statutory scheme of Section 1113. Both the structure and the legislative history of Section 1113 indicate that Congress intended to emphasize mutual agreement through collective bargaining rather than court involvement as the preferred method for changing working conditions. As noted above, before an employer may even apply for authorization to reject, it must present its proposed modifications to the union and negotiate in good faith over its proposal. Thus, Congress envisioned that the court would consider the application to reject only after the parties had attempted and were unable to agree on modifications. And, the court will not grant rejection if the union can demonstrate "good cause" for refusing to accept the proposal. Senator Packwood, whose amendments were the model for this portion of the final bill, stated that the provision requiring employers to bargain in good faith "places the primary focus on the private collective bargaining process and not in the

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8/ Section 1113(d)2) and (f)

9/ C.f. Bildisco, 456 U.S. at 512.

10/ See discussion at pp. 11-12 infra.

courts." 130 Cong. Rec. S8898, June 29, 1984. 11/ Similarly, Representative Morrison, one of the main drafters of the labor provisions in the conference bill, stated:

> The compromise that has been achieved is one that favors. . . negotiations between the debtor and the labor union for the resolution of these problems when they arise. . . . The phrase "without good cause" in subsection (c)(2) . . . is intended to ensure that a continuous process of good faith negotiations will take place before court involvement. . . [T]he overall policy of the provision. . . is to encourage the parties to reach their own agreement through collective bargaining.

H7495-7496. The statute and the legislative history thus demonstrate a Congressional intent that bargaining over proposed changes should occur before rather than after the court's decision on rejection.

Third, a rule requiring post-rejection bargaining before implementation would in many cases exalt form over substance. Although the bankruptcy court will not review the bargaining under NLRA standards before authorizing rejection, 12/ an employer's compliance with the Section 1113 requirements might often also demonstrate impasse. Thus, Section 1113 requires that in order to reject, the employer must have made a proposal, provided relevant information, met at reasonable times and conferred in good faith. An employer who has engaged in such

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11/ All Congressional debate on the "Bildisco" amendments took place on June 29, 1984 and is recorded in Volume 130 of the Congressional Record. Accordingly, subsequent references to the legislative history will specify only the page of the Congressional Record.

12/ The legislative history suggests that the obligation in Section 1113(c) to negotiate in good faith does not require compliance with strict NLRA standards. See remarks of Senator Thurmond at S8888; and Senator Hatch at S8892. Further, those courts which have considered the issue have also held that in applying Section 1113, they do not judge the parties' conduct according to Section 8(a)(5) standards. In re Wheeling-Pittsburgh Steel Corp., 13 BCD 328, 332 (B. Ct.), aff'd 120 LRRM 2199 (W. D. Pa. 1985), rev'd on other grds. ___ F.2d ___, 122 LRRM 2425 (3d Cir. 1986); In re Kentucky Truck Sales, 13 BCD 585, 587 (B. Ct. W. D. Kty. 1985); In re K & B Mounting, 13 BCD 240, 244 (B. Ct. N. D. Ind. 1985).

conduct without reaching agreement might well be privileged under the NLRA unilaterally to implement its proposal. See, Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enf'd 395 F.2d 622 (D. C. Cir. 1968); Harmody Bros. Food Markets, 275 NLRB No. 183, sl. op. at 6 (July 31, 1985). 13/

We recognize that the Union cannot be compelled to bargain prior to rejection. For under Section 8(d) a party to a contract cannot be compelled to discuss proposed modifications before the expiration of the contract. C & S Industries, Inc., 158 NLRB 454, 456-458 (1966). And, until the court authorizes rejection, the contract is enforceable under Section 1113(f) and Section 8(d). Moreover, the fact that an employer has moved to reject and presented a proposal to the union does not automatically mean that the contract will be rejected by the court; the union may be able to demonstrate that the employer's proposal is defective under Section 1113(b)(1) or that the employer has otherwise failed to meet the standard for rejection enunciated in Section 1113(c). In that case the employer's

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13/ We recognize that in the instant case the Union alleges that the Employer's insistence on proposals (5) and (6) precluded it from reaching a good faith impasse because those proposals were illegal. We agree that implementing the Employer's proposal to assign Union stewards to job sites based on whether the unit employees at the site are Union members would be illegal. Nevertheless, we believe the bankruptcy court and any courts of appeal from the bankruptcy court decision are the proper fora for determining the effect of any such illegality on the Employer's right to implement its Section 1113 proposal. We note that in the instant case the bankruptcy court considered the Union's arguments in this regard and the Union failed to appeal the bankruptcy court's adverse findings.

This is not to say that an employer would be privileged under the NLRA to implement illegal terms and conditions of employment because a bankruptcy court authorized rejection of a contract even though a Section 1113 proposal contained an illegal proposal. To the contrary, we would attack as an unfair labor practice, the implementation of any illegal terms and conditions of employment contained in a Section 1113 proposal. (In the instant case, the Employer apparently had no occasion to implement its plan since the Union did not assign any stewards to crews as small as the Employer's.) Our conclusion here is simply that if a bankruptcy court has authorized rejection, notwithstanding that the Section 1113 proposal contained an illegal proposal, the Employer is not precluded from implementing the legal aspects of its proposal.

application for rejection will be denied and the existing contract will continue in effect. For these reasons it could be argued that if a union believes that an employer's proposal does not satisfy the requirements of Section 1113(b) or that rejection should otherwise be denied under Section 1113(c), it should be entitled to litigate those issues before bargaining over the proposal. Allowing the employer to implement its proposal without any further bargaining after rejection, however, means that the union which opts for this litigation course may lose the opportunity to bargain about the employer's proposal if it loses the litigation.

Thus, we recognize that allowing an employer to implement its Section 1113 proposal without further bargaining after rejection undermines to some extent the policies of Section 8(a)(5) and 8(d). Nevertheless, for all the reasons articulated above, we concluded that if a bankruptcy court approves rejection of a contract pursuant to Section 1113, the employer should not be required under the NLRA to engage in further bargaining before implementation of the Section 1113 proposal.

2. Bargaining over changes not encompassed by the Section 1113 proposal

We concluded that an employer is obligated to adhere to all bargaining obligations under the NLRA with respect to changes in working conditions not encompassed in its Section 1113 proposal. In contrast to the circumstances discussed above, requiring an employer to bargain to impasse over proposed changes not included in the Section 1113 proposal furthers the policies of the NLRA without conflicting with the policies of the Bankruptcy Code.

First, as the Supreme Court recognized in Bildisco, an employer is not relieved of all obligations under Section 8(a)(5) by virtue of its filing in bankruptcy. 465 U.S. at 534 (the employer is obligated to bargain "over the terms of a new contract pending rejection of the existing contract or following approval of rejection by the Bankruptcy Court."). See also IGS Extrusion Toolings, 262 NLRB 114, 115 (1982); Oxford Structures Ltd., 245 NLRB 1180, 1183 (1979); Shopmen's Local 455 v. Kevin Steel Products, 519 F.2d 698,794 (2d Cir. 1975).

Second, both the structure of Section 1113 and its legislative history make clear that obligations under the NLRA need be modified to accommodate the policies of the Bankruptcy Code only with respect to those changes in working conditions that are necessary to reorganization. Thus, as noted above, Section 1113(f) prohibits employers from making unilateral changes unless those changes have been the subject of Section 1113 proceedings. Further, Section 1113(c) provides that the court cannot authorize rejection unless it determines that the

proposed changes are "necessary to permit reorganization of the debtor." The legislative history confirms that this language was designed to restrict employers to the minimum departures from contractual working conditions consistent with accomplishing reorganization. See, for example, remarks of Senator Packwood: "[O]nly modifications which are necessary to a successful reorganization may be proposed . . . [T]he debtor will not be able to exploit the bankruptcy procedure to rid itself of unwanted features of the labor agreement that have no relation to its financial condition and its reorganization." S8898. Representative Morrison: "This language makes plain that the trustee must limit his proposal to modify a collective bargaining agreement to only those modifications that must be accomplished if the reorganization is to succeed." H7496. Senator Hatch: "[T]he business must make an offer to its employees' union representative that strives to both preserve the collective bargaining agreement and permit a successful reorganization. . . . The intent . . . is to allow the business to ensure the likelihood of a successful reorganization." S8892. 14/ Based on this analysis we concluded that even though, as discussed above, the Chapter 11 debtor has the right to make certain unilateral changes without violating Section 8(a)(5), that right should be interpreted as a narrow exception to an employer's normal obligations under the Act.

In sum, Section 1113 furthers the rehabilitative policies of the Code by permitting the debtor to make unilateral changes with respect to matters necessary to reorganization. At the same time Section 1113 expresses a Congressional purpose to protect contractual working conditions which do not impinge on the reorganization process. The statutory scheme for implementing these complementary policies is to require the employer to identify the necessary changes and subject them to court scrutiny. The Code does not authorize unilateral changes not subjected to this process. Accordingly, requiring an employer to bargain to impasse before implementing a change not encompassed by the Section 1113 proposal does not undermine the statutory scheme for reorganization.

In the instant case, after the bankruptcy court authorized rejection, the Employer, without any further bargaining with the Union, began to pay employees according to a "variety of factors" rather than according to the contractual wage structure. The Employer's Section 1113 proposal did not include any changes in the contractual wage structure. Moreover, the Employer actually reduced wages by approximately

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14/ The Third Circuit reached similar conclusions regarding the meaning of this phrase. Wheeling Pittsburgh v. Steelworkers, 122 LRRM at 2434-2437.

40%, more than the 30% reduction originally proposed by the Employer and more than the 25% reduction which constituted its final offer. Inasmuch as these changes were not encompassed by the Employer's Section 1113 proposal, there is no basis under the foregoing analysis for concluding that these changes were necessary to the Employer's reorganization. Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally changing the wage structure and the wages of unit employees without giving the Union notice of and an opportunity to bargain over the proposed changes.

B. The validity of the October 16 poll and the withdrawal of recognition

We concluded that because the employer had no reasonable basis for doubting that the Union had lost majority support, the Employer had no grounds for conducting the poll or for withdrawing recognition on October 16. Accordingly, the complaint should include allegations that the Employer violated Section 8(a)(1) by conducting the poll and Section 8(a)(5) by withdrawing recognition.

It is well settled that a recognized or certified union is presumed to enjoy the support of a majority of employees in the unit; unless the employer can rebut that presumption, it is obligated to continue to recognize and bargain with the union. To rebut the presumption an employer must show either that the union has in fact lost majority support or that the employer has a reasonable good faith doubt, based on objective considerations, of the union's continuing support among a majority of the employees in the unit. Wilder Construction Co., 276 NLRB No. 104, ALJD at 7 and cases cited (September 30, 1985). Where, as in the instant case, unit employees have struck the employer, the striking employees must be counted in the unit along with non-striking employees and permanent strike replacements. Id sl. op. at 1, n.1, ALJD at 8; Hutchinson-Hayes, International, Inc., 264 NLRB 1300, 1308, n.18 (1982)

It is further settled that an employer violates Section 8(a)(1) by polling employees regarding their desire for continued union representation, unless the employer can demonstrate that before it conducted the poll, it had an objective basis for doubting the union's majority status. Thus, an employer impermissibly interferes with employee free choice of a bargaining representative if it conducts a poll to oust an incumbent union in circumstances in which the Board would refuse to process the employer's petition for a representation election. An employer's petition is judged by the same standard as its withdrawal of recognition -- namely, the employer must show that the union has lost majority support or that it has a reasonable

belief, supported by objective evidence, that the union has lost majority support. Hutchinson-Hayes, International, Inc., 264 NLRB at 1304-1305 (1982); Thomas Industries, Inc., 255 NLRB 646, 647-648 (1981), enf. den. on this pt. 687 F.2d 863 (6th Cir. 1982). 15/

In the instant case, when the 27 striking employees are added to the 22 employees who were working on October 16, the unit consists of 49 employees. As justification for the poll, the Employer asserts that it had heard statements indicating disaffection with the Union from the 17 strike replacements. Clearly, under the standards discussed above, evidence of lack of support from 17 of 49 unit employees did not give the Employer the reasonable basis for believing that the Union had lost majority support which would have permitted the Employer to conduct a poll of employees' Union sentiments. 16/ Accordingly, we concluded that the Employer violated Section 8(a)(1) by conducting the poll of employees on October 16 and absent settlement, the complaint should include an allegation to this effect. 17/

15/ The Sixth Circuit disagreed with the Board as to the quantum of evidence of loss of support the employer would have to produce to justify conducting a poll. The court concluded that although the employer would have to show "substantial objective evidence of loss of support for the Union," (emphasis in original) it should not have to demonstrate that it had sufficient independent evidence to justify withdrawing recognition. See also NLRB v. A. W. Thompson, Inc., 651 F.2d 1141, 1145 (5th Cir. 1981); Mingtree Restaurant v. NLRB, 736 F.2d 1295, 1299 (9th Cir. 1984). Inasmuch as the evidence relied on by the Employer in the instant case is insufficient to justify the poll under either standard (see discussion infra), the difference between the Board and the Circuit courts on this issue is not dispositive in the instant case.

16/ Since the Employer offered no evidence of disaffection by the 27 strikers or by the 5 non-striking employees who continued to work for the Employer, we concluded that the evidence of disaffection from the 17 strike replacements would not constitute "substantial" evidence of loss of support within the meaning of the circuit court decisions discussed at n.15 supra.

17/ Inasmuch as the poll in the instant case is clearly violative of Section 8(a)(1) under the foregoing analysis, we concluded that it is unnecessary to allege that the poll is also violative because it was not conducted in accord with the standards set out in Strucksnes Construction Co., 165 NLRB 1062 (1967). The Board has refused to pass on whether these

For the same reason, neither the statements of disaffection made before the poll was conducted nor the results of the poll itself provide evidence of loss of majority support that would justify the Employer's withdrawal of recognition. As noted above, the statements of disaffection were attributable to only 17 employees, a small minority of the 49 person unit. Similarly, the poll demonstrated disaffection from 17 employees; 2 of the then-employed employees expressed support for the Union and the striking employees were not polled. Thus, the Employer's poll also demonstrated lack of support from at most 17 employees, far less than half of the 49 unit employees. Accordingly, the Employer's withdrawal of recognition, on October 16, was violative of Section 8(a)(5) and, absent settlement, the complaint should include an allegation to this effect. 18/

C. Case 27-CA-9472

In addition, the Region should amend the complaint in Case 27-CA-9472 to reflect the conclusions that the bankruptcy court's authorization to reject the contract on June 28 did not affect the Union's status as collective bargaining representative

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criteria are applicable to an employer poll conducted to determine whether an employer may withdraw recognition from an incumbent union. See Hutchinson-Hayes International, Inc., 264 NLRB at 1306, n.15; Jackson Sportswear Corp., 211 NLRB 891, n.3 (1974).

18/ We concluded that the Employer did not independently violate Section 8(a)(1) by distributing paychecks and giving employees the rest of the afternoon off after the poll was concluded. We note that an employer's acceleration of the distribution of paychecks on an election day is not per se violative of the Act. The Mosler Safe Company, 129 NLRB 747, 749 (1960). Further, in the instant case, the Employer's announcement that employees would be released early was made before the poll took place. Thus, it was clear that every employee would be free to leave no matter how he individually voted and no matter what the outcome of the poll. Accordingly, it cannot be said that the Employer's action was designed to reward employees for voting against the Union. Cf. CBS Records Division, 223 NLRB 709, 715 (1976); Murcel Mfg. Corp., 231 NLRB 623, 645 (1977). Finally, we concluded that the value of the benefit -- approximately two hours pay -- was minimal and did not tend to interfere with employees' free choice. Hollywood Plastics, Inc., 177 NLRB 678, 679 (1969) (employer's raffle of groceries worth approximately $80.00 did not interfere with election where chances were distributed to all employees who voted and no effort was made to determine how employees voted). We concluded that in these circumstances the Employer's conduct was not unlawful.

and the Employer was not entitled to withdraw recognition from the Union as a result of the October 16 poll. Thus, the complaint should allege that the Union is now the bargaining representative of the Employer's unit employees. Furthermore, it should be amended to include any meritorious allegations that the Employer refused to provide information after June 29, as long as those allegations have not been dismissed or are not otherwise barred by Section 10(b).

D. Matters Concerning the Settlement Agreement

1. We concluded that the Employer violated the Settlement Agreement by withdrawing recognition from the Union on October 16, and therefore the Agreement should be set aside.

A Regional Director may withdraw approval of a settlement agreement if the charged party violates the agreement or commits unfair labor practices of the same or related type as those covered by the agreement. Pacific Grinding Wheel Co., 220 NLRB 1389, 1395 (1975); Princeton Sportswear Corp., 220 NLRB 1345, 1347 (1975).

In Case 27-CA-9241, the Region issued complaint alleging that the Employer violated Section 8(a)(5) by unilaterally discontinuing contributions into the contractually established benefit trusts. On September 17, the Employer entered into a Settlement Agreement in this case in which it agreed, inter alia, "upon request, to bargain in good faith with [the Union] over the terms of a new collective bargaining agreement. . . ." The Union arranged a bargaining session for October 16. When the Employer arrived at that meeting, however, it did not bargain with the Union, but rather delivered a letter withdrawing recognition from the Union.

As discussed above, we have concluded that the Employer violated Section 8(a)(5) by withdrawing recognition at that meeting. Thus, the Employer's conduct was violative of the Settlement Agreement and constituted an unfair labor practice similar to that covered by the Settlement Agreement. Under the principles discussed above, therefore, the Regional Director should set aside the Settlement Agreement and litigate the underlying unfair labor practice. 19/

19/ Because the Region will be setting aside the settlement agreement, it is unnecessary to decide whether the terms of that agreement obligated the Employer to pay the Union's attorney fees incurred in connection with collecting benefit contributions.

2. Furthermore, inasmuch as the Settlement Agreement will be set aside, the Region should amend the complaint in Case 27-CA-9241 to allege that the strike which began on April 16 was caused by the unfair labor practice alleged in the Complaint [redacted] and to seek an order requiring the Employer to reinstate all qualified strikers upon their unconditional offer to return to work [redacted] 20/ Section 10(b) does not bar such an amendment as long as the unfair labor practice itself was the subject of a timely filed charge. Brown and Root, Inc., 99 NLRB 1031, 1035-1036, 1076 (1952), enf'd 203 F.2d 139 (8th Cir. 1953); KXTV, 139 NLRB 93, 96, n.6, 138-139 (1962). 21/

20/ Unless the Settlement Agreement is set aside, both the settlement bar doctrine and Section 10(b) would preclude the General Counsel from litigating any allegation that the strike was an unfair labor practice strike or that the Employer violated the Act by failing to accord the strikers the reinstatement rights of unfair labor practice strikers. See The Davis Fire Brick Company, 131 NLRB 393, 395-397 (1961); The Philip Carey Mfg. Co. (Miami Cabinet Div., 140 NLRB 1103, 1112 n. 6 (1963), modified, 331 F.2d 720 (6th Cir. (1964).

21/ See also City Yellow Cab Co. of Orlando, Inc., 273 NLRB No. 131 al. op. at 1-2, n.3 (January 9, 1985) (No Section 10(b) bar to amendment of complaint after Settlement Agreement properly set aside)

Section 10(b) would, however, bar an allegation that the Employer violated the Act by failing to reinstate the strikers upon their offer to return to work on July 8 because no charge regarding that matter was filed within six months of the Employer's conduct. Dayton Auto Electric, Inc., 278 NLRB No. 80, n.1. Accordingly, the Region should not include any allegation regarding that conduct in the amended complaint. 22/

H.J.D.

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22/ [redacted]